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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.);
TOMAS DE JESUS MANGUAL,

Petitioners,

vs.

CARMEN LUCILA DOMINGUEZ ORSINI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Whether the First Amendment requirement that a defamatory falsehood be "of and concerning the plaintiff," applies to plaintiffs who are neither public officials nor public figures under *New York Times* and its progeny.

2. Whether the requirement applies to a cause of action for invasion of privacy based on the same injurious falsehood.

3. Whether the court below committed error in not dismissing the case as mandated by the First Amendment, once it became an admitted and incontestable fact that newspaper articles did not identify nor refer to the plaintiffs, and that as a matter of law the publications were not "of and concerning" them.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

Petitioners, El Vocero de Puerto Rico (Caribbean International News Corp.) and Tomás de Jesus Mangual,[1] respectfully pray that a Writ of Certiorari issue to review the Supreme Court of the Commonwealth of Puerto Rico.

I- JUDGMENT BELOW

By Resolutions issued November 13, 1992 and December 18, 1992, the Puerto Rico Supreme Court denied review and petition for rehearing, respectively, letting stand the judgment of March 19, 1992 issued by the Superior Court of Puerto Rico, Ponce Section (Ortiz, J.), which is unpublished. A certified translation of these

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[1] Caribbean International News Corp. is a Puerto Rico corporation with offices in San Juan, which publishes the newspaper El Vocero de Puerto Rico; Tomás de Jesus Mangual is a reporter for El Vocero. Codefendants Seaboard Surety Company and WUNO NOTI-UNO, INC. (Century ML Radio Venture) answered the complaint below through independent counsel. The plaintiffs, Respondents herein, are seventeen (17) individuals who reside in Puerto Rico: Carmen Lucila Dominguez Orsini, Enrique Martinez Dominguez, Elsa Maria Maldonado Rodriguez, Raul Martinez Dominguez, Oraida Muñoz, Carlos Luis Martinez Dominguez, Carmen L. Dominguez, Carmen Martinez Bayo, Ana Selenia Dominguez Orsini, Irene Dominguez Orsini, Lourdes del Carmen Martinez Vega, Jackeline Martinez Vega, Ileana Martinez Maldonado, Lymari Martinez Maldonado, Irelys Martinez Munoz and Oraida Martinez Munoz.

documents is included in the Appendix ("App.") hereto, at pp. 1-17.

II- JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1258. The present petition is being filed within ninety days from denial of our petition for rehearing. The judgment issued by the court below is a "final judgment" reviewable by this Court, pursuant to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[2]

[2] The First Amendment issue is conclusive, and is final as to the rest of the litigation; assuming that trial had been held, the same issue would survive intact for review at a later date. Permitting the pendency of this action, a long and complicated case involving seventeen (17) plaintiffs, is not only burdensome to petitioners, but also adversely affects the exercise of First Amendment rights in Puerto Rico generally, since having to face litigation with individuals who are unnamed in news articles has an unquestionably chilling effect on legitimate expression. Reversal of the state court would terminate all litigation. It is a longstanding federal policy to give "breathing space" to the exercise of First Amendment rights, free from the encroachment of state laws. In the present case we have a "final judgment" under categories one, two and four of *Cox*. See, 420 U.S. at 479-483 and cases cited therein. See also, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-56 (1989); *Nebraska Press Asso. v. Stuart*, 423 U.S. 1327, 1329-1330 (1975); compare, *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (the state court decision not a final judgment "within any of the four exceptions identified in Cox.")

III- CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ".

Article II Sec. 8 of the Constitution of Puerto Rico: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."

Article 1802 of the Puerto Rico Civil Code, 31 L.P.R.A. Sec. 5141: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity."

IV- STATEMENT OF THE CASE

1. Statement of Facts

This is a cause of action for damages arising out of the publication of news articles in the Spanish language daily newspaper El Vocero de Puerto Rico,[3] dated February 17 and 23, 1990, and a news broadcast by local radio

[3] In Spanish, a "vocero" is a spokesman.

station W-UNO on the latter date. The main subject of these publications is the fact that Luis Martínez Bayó shot himself while at his home on January 22, 1990, and the reasons he purportedly had to commit suicide.

Respondents, relatives and in-laws of Mr. Martinez,[4] do not controvert the fact that none of them was identified or referred to in the publications, individually or as a group, directly or by innuendo, truthfully or otherwise. There is no allegation that anyone thinks that any of the respondents was referred to.

The Resolution of the court concisely summarizes the gist of the publications,

> [T]o the effect that decedent, Mr. Luis Martínez Bayó, had had carnal relations by paying a supposed prostitute called Rosana, that she died as a result of a disease called Acquired Immunodeficiency Syndrome (AIDS), that the name of Mr. Luis Martínez Bayó appeared in a list of said prostitute's clients, which list she allegedly gave to the physicians who attended to her during her illness, that said list included a group of "numbers racket mafiosi" and that Mr. Luis Martínez Bayó, upon learning that his name appeared in said list, "could not overcome the shock he received because of this chilling news and blew out his brains through a shot on the head." App. p. 1-2.

The thrust of respondents' claim is that the alleged motives behind the suicide of Mr. Martínez are false. No

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[4] Plaintiffs include the widow, the sisters, the sons, the daughters-in-law, the sisters-in-law and the granddaughters of Mr. Martínez.

allegations are made as to what were his real motives, or inferring that the media could or should have known them, or in fact knew of them.[5] The respondents seek monetary redress on two distinct grounds, but based on the same published information: damage to their reputation, and invasion of personal and family privacy. App. p. 2.

2. Procedural History

The complaint was filed on May 2, 1991 against petitioners and W-UNO. Petitioners answered the complaint, presenting, among others, the "of and concerning the plaintiff" defense under the First Amendment. Petitioners filed a motion requesting dismissal, as a matter of law, on the strength of the allegations contained in the complaint. See App. p. 11, n.4. Petitioners argued that as a matter of law, irrespective of the label or allegation invoked by respondents (i.e., libel, invasion of privacy, emotional distress, etc.) they were bound by the same First Amendment standards applicable to the fifty states, and therefore the decedent's relatives do not have a cause of action for injurious falsehood.

On March 19, 1992, the Superior Court denied the motion, concluding that "the relatives of a person who allegedly has been the object of false publications have a valid and protected cause of action." App. p. 14. What

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[5] Additionally, there are no allegations that petitioners published the names of potential AIDS victims while Mr. Martínez was alive. In other words, the publications came one month after his death and indisputably had no connection to that event.

plaintiffs, respondents herein, have to prove is simply "that damage has occurred, that the originator of the damage was culpable and negligent in his conduct and the damages caused." Id.

Petitioners filed a Writ of Appeal to the Supreme Court of Puerto Rico on April 22, 1992, based on First Amendment case law. We pointed out that this issue has never been before that court. On November 13, 1992 review was denied "in this stage of the proceedings."[6] App. p. 16. A petition for rehearing was filed, arguing that the crucial issue would not vary in any other "stage" of the case: even after discovery and trial, the basic fact would remain unaltered: the 17 plaintiffs were not mentioned in the publications. Petitioners also requested that the appeal be consolidated with three (3) other El Vocero cases based on the "of and concerning" defense which have been pending review for several years before that court.[7] In the Resolution of December 18, 1992, the court "denies said petition and the motion requesting consolidation with other appeals." App. p. 17.

As a result, the Supreme Court of Puerto Rico has implicitly recognized the respondents a cause of action for both libel and invasion of privacy. It has sanctioned the view that the First Amendment requirement that a publication be "of and concerning the plaintiff", as an element of a cause of action for libel or invasion of

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[6] Associate Judge Rebollo-López would have granted the appeal; Chief Judge Andreu-García disqualified himself.

[7] *Campoamor v. El Vocero*, CE-90-123, *Gonzalez v. El Vocero*, RE-90-337 and *Rodríguez v. El Vocero*, CE-91-414, however, are libel cases.

privacy, is not applicable to a plaintiff who is a "private" individual,[8] even if the news items pertain to a matter of legitimate public interest.[9]

REASONS FOR GRANTING THE WRIT

1. The First Amendment requires that a news article of public interest be "of and concerning" a plaintiff in order to recognize him a cause of action for libel.

The "of and concerning the plaintiff" requirement in defamation cases in the common law is of ancient origin.[10] Smolla, *Law of Defamation*, New York (1991) p. 4-35, depicts the norm as follows:

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[8] Not a public official or public figure under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny.

[9] The court below states that even assuming that public interest, the case must go to trial to see if "the alleged invasion of the complainant family's privacy was not *necessary and inevitable nor did it constitute the most adequate way for communicating* the message to the reading public." App. p. 12. (Emphasis supplied).

[10] The early cases, many predating the First Amendment itself, focused on the requirement as a common sense matter. It is difficult to conceive that an individual's reputation could be affected by an utterance, written or verbal, that does not specifically refer to that individual. See, e.g., *Wiseman v. Wiseman*, 79 Eng. Reprint 92 (1906); *Roach v. Garvan*, 126 Eng. Reprint 683 (1742); *Bourke v. Warren*, 172 Eng. Reprint 138 (1826) (Abbott, C.J.); Gatley, "On Libel and Slander" (London, 1981). New York and Virginia cases referred to the requirement as a settled element required of the plaintiff in *Sumner v. Buel*, 12 Johnson Rep. 475 (1815), and *Cave v. Shelor and Wife*, 4 Va. Rep. Annot. 362, 2 Munford 193 (1811). See also, in general, *Hargrove v. Oklahoma Press Pub. Co.*, 265 P. 635, 637 (1928); Newell, *Libel and Slander*, (4th Ed. 1924), § 220 and cases cited therein; Note, *Developments*

> To be actionable the defamatory statement must be understand as being "of and concerning" the plaintiff. It is axiomatic that there is no such thing as defamation in the air; the defamatory words must refer to someone, and because defamation is a recipient-centered tort, the reference must be understood.
>
> The plaintiff need not be cited by name for the defamation to be "of and concerning" him. If there is no explicitly literal reference, the plaintiff must sustain the burden of pleading and proof, by way of "colloquium", that the defamatory statement refers to him. If the burden is not met there is no defamation and the case is dismissed. [notes omitted]

Although in a 1937 press case reference was made to a constitutional rationale behind the common law requirement,[11] it was not until the decision in *New York Times*, supra, 376 U.S. at 288-292 (1964), that this Court acknowledged the "of and concerning" requirement as a First Amendment safeguard available to the press in libel cases:

> We also think the evidence was *constitutionally defective* in another respect: it was incapable of supporting the jury's finding that the allegedly

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in the Law of Defamation, 69 Harv. L. Rev. 875, 917-933 (1956); Sanford, *Libel and Privacy* (2d Ed. 1991), pp. 120-123.

[11] The rule was seen as a "sound compromise" between the conflicting interests in libel cases in *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502, 505 (D.C. Cir. 1937) ("On the one hand is the social interest in free press discussion of matters of general concern, and on the other is the individual interest in reputation.").

> libelous statements were made "of and concerning" respondent. [Emphasis ours]. Id. at 288.

Two elements are worthy of note. First, there must be evidence that the publication specifically referred to the plaintiff; if the uncontroverted evidence would not support a jury verdict in that regard, the court must adjudicate the legal issues independently.[12] Secondly, there is no indication that the requirement depends on the status of the plaintiff as a public official or "private" individual.

In *Rosenblatt v. Baer,* 383 U.S. 75 (1966), this standard would be reiterated as a requirement arising from the First Amendment.

> We held that evidence that Sullivan as Police Commissioner was the supervisory head of the Police Department was constitutionally insufficient to show that the statements about police activity were "of and concerning" him; we rejected as inconsistent with the First and Fourteenth Amendments the proposition followed by the Alabama Supreme Court in the case[.]
>
> . . .
>
> There must be evidence showing that the attack was read as specifically directed at the plaintiff. Id., at 82-83.

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[12] Although *New York Times* was not decided on summary judgment, the cited text suggests that if uncontroverted pleadings make trial superfluous as to whether the publication refers specifically to the plaintiff, summary judgment should be granted against the plaintiff. This result would be expected a fortiori in Puerto Rico courts, where there are no juries in civil proceedings.

The common law requirement that a publication be "of and concerning" is now part of the First Amendment safeguards available to the press. The States, as well as Puerto Rico,[13] are not free to ignore this requirement, in the same way and for the same reasons that they cannot impose liability without the requisite proof of fault, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-349 (1974) (negligence), or *Harte-Hanks v. Connaughton*, 491 U.S. 657, 668 (1989) (actual malice); or without the requisite proof of falsity, *Hepps v. Philadelphia Newspapers, Inc.*, 475 U.S. 767 (1986).[14]

The respondents cannot maintain a cause of action for libel against petitioners, where it is uncontroverted that the publications are not "of and concerning" them. The articles clearly pertain to Mr. Martínez by name; we are not dealing with an ambiguous reference that could

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[13] First Amendment rights have been recognized to apply to U.S. citizens in Puerto Rico to the same degree as citizens from any of the 50 states and the District of Columbia. *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328, 331 (1986); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979); *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922). See also, *Schneider v. State*, 308 U.S. 147, 160 (1939); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Near v. Minnesota*, 283 U.S. 697, 707 (1931). This limitation has been recognized by the Puerto Rico Supreme Court. See, *Villanueva v. Hernández Class and El Vocero*, 91 JTS 58, p. 8697 (1991); *Clavell v. El Vocero*, 15 Off.Trans. 902 (1984); *Aponte Martínez v. Lugo*, 100 PRR 281 (1971); the norm receives lip service from the court below, App. p. 13-14.

[14] See also *New York Times*, 376 U.S. at 378-380; *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-511 (1984).

conceivably include other persons, including the respondents. Therefore, regardless of the evidence that could be produced at the trial stage, that decisive fact shall remain unaltered.

2. The requirement applies to any cause of action based on injurious falsehood, regardless of the specific state law label.

The "of and concerning" requirement has also been recognized through the years in cases involving privacy, instead of reputational interests, since both are held to be personal and non-transferable.[15] The fact that plaintiffs are relatives of the person actually referred to in the publication does not bring about a relaxation of the requirement.[16]

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[15] *Geisler v. Petrocelli*, 616 F. 2d 636, 639 (2d Cir. 1980); Smolla, *Law of Defamation*, New York (1991), pp. 10-15 – 15-16. *Memphis Dev. Fd. v. Factories, Etc., Inc.*, 616 F. 2d 956, 957 (6th Cir. 1980); *Maritote v. Desilu Productions Inc.*, 345 F. 2d 418, 419 (7th Cir. 1965); cert. den. 382 U.S. 883 (1965); *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F. 2d 9, 12 (5th Cir. 1962); *Ravellette v. Smith*, 300 F. 2d 854, 857 (7th Cir. 1962); *Rozhon v. Triangle Publications*, 230 F. 2d 359, 361 (7th Cir. 1956); *Service Parking Corp. v. Washington Times Co.*, 92 F. 2d 502, 505-506 (1937). See also, *Nelson v. Maine Times*, 373 A. 2d 1221, 1225 (Me. 1977). *Lugosi v. Universal Pictures*, 139 Cal. Reptr. 35 (1977); *Kelly v. Johnson Pub. Co.*, 335 P.2d 659 (1958); *Abernathy v. Thornton*, 83 So. 2d 235 (1955). See also the **Restatement 2d of Torts** (1977) § 564, comment a, and § 580A, comment g.

[16] *McBeth v. United Press International, Inc.*, 505 F.2d 959 (5th Cir. 1974), cert. den. 421 U.S. 976 (1975); *Wilson v. Retail Credit Co.*, 325 F.Supp. 460, 463 (S.D. Miss. 1971); *Wildstein v. New York Post Corp.*, 243 N.Y.S. 2d 386 (1963), aff'd, 261 N.Y.S. 2d 254

New York Times and its progeny have eliminated common law concepts in favor of the "breathing space" necessary for a vigorous public debate. It is entirely logical that those elements of the common law that tend to contribute to the openness of that debate, which is paramount in a democracy, should be protected under the First Amendment. While strict liability and presumption of damages have been constitutionally prohibited, it is totally consistent that a plaintiff be required to show that a publication specifically refers to him as a prerequisite for a libel action.

In terms of the safeguards established by *New York Times* and its numerous progeny against press self-censorship, there is no recognizable basis for distinguishing between libel and *invasion of privacy* cases, at the very least when the latter are based on the publication of an allegedly injurious falsehood.[17] Application of First Amendment standards cannot depend on the label affixed on a cause of action under state law by a plaintiff, and such a label should be deemed irrelevant in determining whether in a given case certain constitutional

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(1965). See also, *Gugliuzza, et al. v. KCMC, Inc.*, 20 Med.L.Rptr. 1866, ___ La. ___, (1992); and *Maritote, Santiesteban, Rozhon, Abernathy* and *Kelly*, **supra.**

[17] At times, as a practical matter it is difficult to distinguish between both causes of action. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 383-384 (1966) ("Although not usually thought of in terms of 'right of privacy,' all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right to privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be and element bearing on such damage.") Id., n.9.

defenses are available to the press. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Cohen v. Cowles Media Co.*, 115 L. Ed. 2d 586, 589 (1991);[18] *Blatty v. New York Times*, 728 P.2d 1177, cert. den. 108 S. Ct. 1107 (1986). In the *Falwell* decision, for instance, plaintiff brought several causes of action under differing denominations (libel, intentional infliction of emotional distress, and invasion of privacy), prevailing in the court of instance only in that of intentional infliction. Later this Court dismissed that cause of action, holding that the limitations of the First Amendment were equally applicable to it.

The correct focus is the nature of the publication itself and the relative importance of the interests involved. Decisive significance should not be given to perceived differences between a cause of action for libel and one for "false light" invasion of privacy, where the alleged damage goes to the name or honor of a person.

If the topic of a newspaper article is one that should be protected under the First Amendment concepts established under *New York Times* and its progeny, that protection must not be made to depend on the label placed by plaintiffs on a cause of action. This would remove all predictability from the pre-publication review regularly performed by the mass media. *New York Times* standards

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[18] Although in a different context, see *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (access to preliminary proceedings under the First Amendment "cannot be resolved solely on the label we give the event, i.e. 'trial' or otherwise"). Regarding the relative interchangeability of labels and the propensity towards "creative pleading", see Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution* (1983) 23 Wash.L.J. 24, 30-44.

must be anchored on familiar concepts if they are to fulfill their stated function. Allowing lawsuits by unnamed individuals would signify a "chilling effect" of disturbing proportions, precisely the opposite of the vigorous debate that the First Amendment is supposed to guarantee.

3. Application of the "of and concerning" requirement under the First Amendment should not depend on the status of the plaintiff as a public official or a public figure.

The court below made reference to *New York Times* and *Rosenblatt*, as well as *Falwell*. App. p. 3. It distinguished the first two cases because they involved "public official" plaintiffs, and the third because it dealt with a "public figure". It held, therefore, that this Court's case law in "legal suits brought forth by false publications has not resolved that the relatives of a person object of said publications do not have a cause of action of their own." Id. It specifically concluded that the cited cases left the court, "in the absence of any constitutional impediment," free to recognize the respondents a cause of action. App. p. 6.

Although coincidentally in the cited cases plaintiffs were not "private" individuals, we fail to find justification for distinguishing the present case in that regard. Additionally, the well-settled common law doctrine that existed prior to *New York Times* and *Rosenblatt* certainly had never dwelled on a distinction or exception based on any "status" of the plaintiff. Distilled to its essence, the

doctrine refused to recognize the possibility of damage to a person's reputation without proof that the expression at least pointed him out. Regardless of the form of the expression deemed defamatory, or the station in life of the plaintiff, he had to bring forth evidence that the statement was "of and concerning" him.[19]

A "private" individual must prove the same basic element of identification that a "public official" must establish. It should be understood that *Gertz* prohibits the states and Puerto Rico from recognizing a cause of action for libel to a "private" plaintiff when there is no controversy that the plaintiff was not specifically referred to in an article of public interest.

There are well-settled differences in the burden of proof to be required from a "private" versus a "public" plaintiff under *New York Times*. These have a firm basis in the function of speech regarding public or official conduct, and its effect on public debate. Logic dictates that a potential plaintiff must be able to prove that a certain expression specifically referred to him. A requirement that fault be pleaded hardly would make sense if it is not premised on the existence of an ascertainable individual to whom a certain standard of care is owed.

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[19] Although there may be cases where the absence of reference to any given person could give way to controversy as to who is actually referred to, that is not the case where specific reference by name to one person rules out potential reference to others. The publications by petitioners clearly identified Mr. Martínez as the person who committed suicide.

4. The lower court's recognition of a cause of action should be reviewed "at this stage of the proceeding"

Petitioners are being subject to a judicial process whose existence or continuation cannot be justified. Hence, the denial of the Supreme Court of Puerto Rico to address this issue "in this stage of the proceedings" is misleading.

The decisive issue shall not be altered in any other "stage of the proceeding." Plaintiffs do not even allege that they will attempt to introduce evidence that the publications refer to any of them, individually or as a group. The remarks of the court below leave little room to doubt that a cause of action *has been recognized as a matter of policy* (plaintiffs have a "valid and protected cause of action." App. p. 14) The factual framework of the case is not a real issue: the court of first instance clearly states that its view of the applicable law would not alter "even assuming that the news item published by El Vocero had the public interest of informing about AIDS." Basically, the trial on the merits would focus on the damages allegedly sustained by respondents.[20]

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[20] It is highly disturbing that the court of first instance sees its role in remaining proceedings as one of a "supra-editor" in which the court will review the text of publications, true or false, and see if those expressions were "the most adequate." This judicial function is unprecedented in Puerto Rico. Editors at the present time do not have to justify to the judicial system (or to anyone else, for that matter) their editorial judgment as to choice of topics, words or photographs. Such a posteriori censorship would be a clear intrusion into the editorial process. *Miami Herald v. Tornillo,* 418 U.S. 241 (1974). We submit it would

The philosophical underpinnings of this position constitute a lightly veiled threat to stand *New York Times* on its head; in cases that are not even arguably "of and concerning" the plaintiffs, they only have to convince a judge that El Vocero was "negligent in its conduct" (App. p. 14) because it used certain language in a published article which was "not necessary and inevitable" or the "most adequate way for communicating the message to the reading public." App. p. 12.

CONCLUSION

It is highly important that this Court determine that the "of and concerning" requirement applies to newspaper publications of public interest regardless of the plaintiff's status as a private or public figure. Consistent with First Amendment principles, the focus of the doctrine's application should be the guarantee of "breathing space" to public debate, and concomitant vigor to what has been called the "marketplace of ideas."

Equally important is that the application of the requirement must hinge on whether the expression on which plaintiff bases his claim is an injurious falsehood, regardless of the exact label that could be affixed according to state law. The safeguards built by *New York Times* and its progeny cannot be made to depend on the proficiency of counsel for the plaintiff in affixing a label on the cause of action.

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be unconstitutional even if parameters were given for the fact finding process.

Respectfully submitted, in Washington, D.C. this 22nd day of February, 1993.

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Certified Translation

IN THE SUPERIOR COURT OF PUERTO RICO
PONCE PART

CARMEN LUCILA DOMINGUEZ ET AL.	*	
Plaintiffs	*	CIVIL NO. CS-90-1111
v.	*	
CARIBBEAN INTERNATIONAL NEWS CORP. D/B/A EL VOCERO DE P. R.	*	RE: DAMAGES

RESOLUTION

Plaintiffs in the above-captioned case, relatives of the decedent, Luis Martínez Bayó, brought before this forum a complaint for damages against Caribbean International News Corp., an enterprise that publishes El Vocero newspaper (hereinafter El Vocero), the writer for that newspaper, Mr. Tomas de Jesús Mangual and radio broadcasting station WUNO Notiuno, Inc.

It is alleged in the complaint that on February 17 and 23 of 1990, codefendants Caribbean International News Corporation and Tomas de Jesús Mangual published in El Vocero newspaper, in a false and negligent manner, with total contempt for the truth, a news item to the effect that decedent, Mr. Luis Martínez Bayó, had carnal relations by paying a supposed prostitute called Rosana, that she died as a result of a disease called Acquired Immunodeficiency Syndrome (AIDS), that the name of Mr. Luis Martínez

Bayó appeared on a list of said prostitute's clients, which list she allegedly gave to the physicians who attended to her during her illness, that said list included a group of "number racket mafiosi" and that Mr. Luis Martínez Bayó, upon learning that his name appeared in said list, "could not overcome the shock he received because of this chilling news and blew out his brains through a shot on the head".

Likewise, it was alleged that on February 23, 1990, codefendant WUNO-NOTI-UNO, INC., also in a false and negligent manner, with total disregard for the truth, broadcasted on the radio through one of its radio commentators, the previously mentioned false information.

It was also alleged that said publications constitute an abusive and unjustified attack to the honor, the reputation and the private and family life of plaintiffs, as well as a merciless contempt for the feelings of the latter, for which reason all and each one of the plaintiffs has undergone and continues to undergo great anguish and suffering; they have been subjected, besides, to public mockery and ridicule, which has caused them great humiliation.

After several legal procedures, El Vocero and codefendant Tomas de Jesús Mangual presented a "Motion Requesting Judgment on the Allegations" wherein, in essence, it is held that the relatives of a dead person who was the object of an alleged false publication do not have, as a matter of law, a cause of action of their own. Said contention is based on arguments of constitutional nature.

Plaintiffs presented an "Opposition to the Motion Requesting Judgment for the Allegations" which, in turn, was answered by El Vocero and Tomas de Jesús Mangual.

An analysis of the American doctrine and jurisprudence, and of our jurisdiction, that are applicable makes imperative that the motion presented by defendant be denied.

The federal jurisprudence that has attended to the constitutional problem presented by legal suits brought forth by false publications has not resolved that the relatives of a person object of said publications do not have a cause of action of their own. In contrast, the boundaries imposed by the First Amendment of the United States Constitution limit the actions of public figures who have been the object of libel, requiring that the existence of actual malice be shown, *New York Times v. Sullivan*, 376 U.S. 254 (1964); and in fact, they limit the right to bring suit against a publication containing true private information, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[1] Nevertheless, nothing indicates that the limits to actions by relatives have a constitutional origin.

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[1] *Rosenblatt v. Baer*, 383 US 75 (1966), a case cited by defendants in their Motion to Dismiss is distinguishable and inapplicable to the instant case because the former had to do with a municipal public official, who has to prove actual malice to establish his claim, who presented his suit alleging libel as a consequence of a publication that addressed an imputation of possible corruption against the government institution of which the public official had been part and not against him in his private character.

Hustler Magazine v. Falwell, 485 US 46 (1988), is also distinguishable and inapplicable because it deals with a claim

In the American jurisdictions, the problem of actions by relatives is really one of common law or of a statutory nature; which each jurisdiction solves in accordance to their laws in effect. In that sense, two views of the problem have been developed; the majority view holds that in the absence of reference to the relatives in a publication, these do not have the right to a cause of action for invasion of the right of privacy. The other view, which is the minority one, holds the opposite. [See in general, *Invasion of Privacy by Publication Dealing With One Other than Plaintiff*, 18 ALR 3d 873 (1968)]. The Georgia jurisdiction seems to be the one which has accepted most solidly this minority position. See *Cox Broadcasting Corp. v. Cohn*, 200 S.E. 2d 127 (1973). A clear sample of the *validity of the law in effect* is the case of *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (1979). In it, the United States District Court for the District of Texas faces a claim for damages brought by the parents of a murdered young man, against a television station that broadcast a news item that established the relation between the death and a homosexual relationship. The District Court, in the absence of clear jurisprudence in the Texas jurisdiction, discussed the two views in effect in other state jurisdictions which had faced the problem. The analysis led the Court to the conclusion that the majority position in the American jurisdictions is to the effect that the relatives of the

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brought by Jerry Falwell, a known public figure and controversial evangelist American minister, against a pornographic magazine of general circulation in all of the United States.

The deceased Luis Martínez Bayó and the plaintiffs members of his family cannot be considered public officials nor public figures for the purpose of this suit.

deceased lack a cause of action for invasion of privacy, own or inherited; and that, by contrast, the minority position allows this type of action.[2]

From a statutory point of view, jurisdictions like Rhode Island have recognized a specific cause of action to the descendants of a deceased person who has been

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[2] The Court, upon discussing the two views stated the following: "Under at least three of the categories, the right to privacy is considered personal in nature. The Restatement of Torts 2d provides that: Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. The case of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. Restatement [Second] of Torts, Sec. 6521 (1977); See also W. Prosser, supra, at 814-15. Under the majority view, the deceased's relatives may not maintain an action for invasion of privacy, either based on their own privacy interests or as a representative for the deceased, where the alleged invasion was directed primarily at the deceased . . . There are cases which support the minority view that the deceased relatives may recover for the invasion of their own privacy interests, most notably the jurisdiction of Georgia . . . In summary, the court believes that the majority rule should be applicable under Texas law. Therefore, the plaintiffs cannot maintain this action for invasion of their right of privacy where the defendants' broadcast makes no reference to them. They likewise cannot maintain an action for invasion of their son's right of privacy since the right is personal. *The court recognizes that the minority view has a certain theoretical support but also believes that the majority position is not irrational.* The defamation law of Texas also provides some analogy for determining the proper approach under Texas law with respect to privacy actions." (Supplied emphasis) pp. 147-148.

defamed in a publication, be it either in a newspaper, through the radio or on television.[3]

In accordance to what has been stated, this Court, in the absence of any federal constitutional impediment, must search for its decisory parameters in the laws that are in effect in Puerto Rico, with special emphasis on the importance that our society, by means of the constitutional and judicial process, has recognized to the right of privacy.

A review of the allegations in the complaint reflects that this action is mainly based on the right of privacy of the plaintiffs. In Puerto Rico this right has a different history and its scope is broader than its counterpart in the federal jurisdiction. *Figueroa Ferrer v. E.L.A.*, 7 Off. Trans. 279 (1978). This constitutional right imposes on every person the obligation to respect and protect the private and family life of the other human beings. To that effect, in face of the nature of the harmful conduct imputed against the defendants and its negative effect on the honor, private and family life of the plaintiffs, the instant cause of action aimed at obtaining an indemnity for the damages caused has constitutional root and origin, and

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[3] R. I. Gen Law Sec. 10-7.1-1: "Whenever a deceased person shall have been slandered or libeled in an obituary or similar account in any newspaper or on any radio or television station within three (3) months of his date of death, and such account would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of said person".

Article 1802 is the statutory mechanism for making it feasible. *Colón v. Romero Barceló,* 12 Off.Trans. 718 (1982).

Mental anguish has been defined under Article 1802 of the Civil Code as those mental and emotional disturbances generated by the culpable and negligent conduct of a determined person and for which the culpable originator shall be responsible as to making amends for the harm caused.

In the area of extra-contractual liability it is a matter of general knowledge that the three elements to be proved are: the culpability or negligent conduct, the damages, and the causal relation between such conduct and said damages. Brau del Toro, *Daños y Prejuicios Extracontractuales,* Publicaciones JTS, p. 141 (1986).

In his analysis of Article 1902 of the Spanish Civil Code, equivalent to Article 1802 of ours, treatise writer Jaime Santos Briz states that the doctrine allows in an unanimous manner the reparation of moral damages. Throughout his discussion and analysis, Santos Briz holds that the reparation of the moral damage does not differ from the reparation of other damage, in the measure in which the cause of action has as an objective repairing in the person of the victim the damaging consequences of a fault. Albaladejo, *Comentarios al Código Civil y Compilaciones Forales,* commented by Santos Briz, Tomo XXIV, *Revista de Derecho Privado,* (1984).

Specifically, as to the grounds for all the causes of action aimed at a compensation for damages due to mental anguish and emotional suffering, Santos Briz explains that:

> [what is being sought is to provide the injured or damaged party a satisfaction for the wrong and affliction caused him, that grants him not certainly an indemnity properly said or a mensurable equivalent to the loss of his peace and joy of living, but indeed a certain compensation for the wrong sustained and for the injustice committed personally against him. From this point of view, the 'pecunia doloris' not only makes reference to the damage suffered by the injured party, but mainly to the acts of the injurer, that is, to the major or minor offensive and reproachable nature of his conduct". Albaladejo, *Comentarios al Código Civil y Compilaciones Forales,* commented by Santos Briz, Tomo XXIV, *Revista de Derecho Privado,* p. 219 (1984).

The Spanish courts have repeatedly recognized the justification of damages for mental and moral anguish. For example, the Judgment of February 7, 1962 expressly indicates that:

> "in modern times it has been accepted in a definite manner the principle of indemnity of moral damages, because although the rights of the personality do not conform to a pecuniary estimate, for which reason money here cannot comply with its role of an equivalence as in the case of an indemnity for a material injury, the victim of moral damages suffers pain, and the indemnity for the material damage, the victim of moral damages suffers pain, and the indemnity serves to reestablish the broken equilibrium, being able, thanks to the money, according to his tastes and temperament, to avail himself of pleasant sensations, or rather, the indemnity agreed to for the injured taking up the shape of

> a satisfactory indemnity to the charge of the one responsible." (Ibid, pages 222-223).

Following the civil tradition, the Supreme Court of Puerto Rico has recognized on several occasions the justification of damages for mental anguish, without imposing any other restriction, provided that there is compliance with the requirements set in Article 1802 of the Civil Code. In *Rivera v. Rossi*, 64 PRR 683 (1945), it was resolved that in order to configure a cause of action there is no difference between physical and moral damages. Our highest judicial forum held in its opinion that:

> "If the moral damage has really existed and is the natural consequence of a culpable and negligent act by the defendant, or the culpability or negligence of the defendant is the immediate cause of the damage, what logical reason, what principle of justice can bring opposition in order to deny its compensation? . . . And if Article 1802 does not distinguish between moral damage and physical damage for the purpose of an indemnity, why should we establish a distinction?" (Ibid, pages 724 and 725).

The principle outlined above was reaffirmed by the Supreme Court of Puerto Rico in *García Pagan v. Shiley Caribbean*, 88 JTS 101 (1988), in the following manner:

> In the local sphere our jurisprudence does not distinguish between physical, material or moral damages for the effect of indemnity . . . Damage is every material or moral injury sustained by a person, either to his natural vital assets, to his property or to his patrimony, caused in contravention of a juridical norm, and for which another is answerable . . . Civil responsibility is precisely the duty to indemnify the injured,

> granting an economic value to the sustained damage. (Ibid, page 6116).

Concerning moral damages, said opinion adds that:

> Although in principle the damages that are intangible, such as suffering, mental anguish and emotional damage, are considered non-patrimonial damages since their pecuniary valuation is not based on a mathematical equivalency, they do not cease to be compensable in money. (Ibid, page 6116).

These doctrinal statements are the consequence of a broad view of the liability or guilt concepts in civil law, which contrast with the compartmentalized view of the common law torts. Concerning the guilt concept it has been stated that it is:

> *"as infinitely broad as the behavior of human beings and it includes any fault by a person which produces an evil or an injury . . . This precept constitutes a general standard for the indemnity of every illicit injury. . . . inclusively when the culpable act contravenes interests or rights guaranteed by the constitution or by legislation that protects civil rights."* *Bonilla et al. v. Chardón et al.* 87 JTS 28 (1987), page 4825. (supplied emphasis).

This broad vision of the guilt concept, proper of the civil law system, must include the imputed conduct of the defendants. According to the civil law principles already outlined and to the mandates of the Constitution of the Commonwealth of Puerto Rico concerning the protection of the people's right of privacy, the Supreme Court of Puerto Rico recognized a cause of action of constitutional origin in the case of *Colón v. Romero Barceló*, 12 Off.Trans 718 (1982).

This case deals with a suit for damages because of the publication of a photo of the son of the plaintiffs, in which his body appeared in a grotesque manner after being murdered, and it was published without due authorization by the parents. The argument presented by plaintiffs in their claim was that the defendants' action constituted an invasion of their privacy which caused them mental anguish and suffering (supra, page 721)

After the Supreme Court of Puerto Rico established that the right of privacy in our county has a history that is different and broader than the one that exists in the federal legislation (supra, page 723), it concluded that the way to vindicate the right to privacy and family integrity is through a cause of action under Article 1802 of the Civil Code.

Colón v. Romero Barceló, (supra), clearly establishes that any person who sustains moral humiliation, mental anguish and emotional suffering as a consequence of a non-essential publication of little or no social value or public interest, and which is not indispensable and inevitable in order to comply with the purpose of communication, can claim an indemnity for the damages suffered as a consequence of the unjustified violation of his right of privacy.

Granting as true[4] the allegations stated in the above-captioned complaint, which accuse the defendants

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[4] Bear in mind that a motion to dismiss admits the certainty of the facts well alleged in the complaint. See *Sierra v. Bird,* 78 PRR 161; *Sacarello v. Junta,* 75 PRR 253; *Boulón v. Pérez,* 70 PRR 941; *Walker v. Tribunal;* 72 PRR 651; *Gonzalez v. Hawayek,* 71 PRR 493; *Pérez v. Hawayek;* 69 PRR 46; *Hernandez v. Ayala,* 68 PRR 883; *De la Cruz v. Gobierno de la Capital,* 68 PRR 496.

of publishing false information whose content allegedly affected the privacy of the relatives close to the deceased, the latter have a cause of action both from the constitutional point of view as well as from the statutory one already set forth.

Even assuming that the news item published by El Vocero had the public interest of informing about AIDS, it must be elucidated on the merits whether the alleged invasion of the complainant family's privacy was not necessary and inevitable nor did it constitute the most adequate way for communicating the message to the reading public.

In resolving the Motion to Dismiss presented by El Vocero and Tomas de Jesús Mangual, in no way are we adjudging the case on its merits. We are aware that in

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The sufficiency of a complaint must be considered in the light of the situation most favorable to plaintiff; thus, a complaint must not be dismissed unless it appears with certainty that the plaintiff does not have a right to any remedy under any situation of facts which could be proved as grounds for the claim in it. See *Cruz v. Ortiz*, 74 PRR 298; *Zalduondo v. Méndez*, 74 PRR 597; *Rodríguez v. Tribunal*, 74 PRR 616; *Cruz v. Ramírez*, 75 PRR 889; *Izquierdo v. Izquierdo*, 80 PRR ___.

The Court, when resolving a motion to dismiss should not determine the final merits of the claim made in the complaint and indeed only consider under the light of the situation most favorable to plaintiff; thus, a claim must not be dismissed unless it appears with certainty that the plaintiff does not have a right to any remedy under any situation of facts which could be provided as grounds for the claim made in it. See *Cruz v. Ortiz*, supra; *Zalduondo v. Méndez*, 74 PRR 597; *Rodríguez v. Tribunal*, 74 PRR 616; *Sacarello v. Junta de Retiro*, 75 PRR 253; *Cruz v. Ramírez*, 75 PRR 889; *Izquierdo v. Izquierdo*, supra; *Candal v. C.T. Radiology*, 12 Off.Trans. 278.

what concerns the applicable law, this Court has the duty of recognizing to the press the minimum guarantees of protection contained in the First Amendment to the Constitution of the United States, as established by the federal Supreme Court. See: *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974); *Schneider v. State*, 308 US 147 (1939); *Lovell v. Griffin*, 303 US 444 (1938) and others.

Our Supreme Court has recognized that the Supreme Court of the United States has the constitutional faculty to dispose the minimum degree of protection of the rights of the American citizens under the protection of the federal Constitution and that, furthermore, this minimum degree of protection standard covers the rights of freedom of speech and of the press. *Aponte Martínez v. Lugo*, 100 PRR 281 (1971).

The law in effect has been widely recognized and reiterated by our Supreme Court in *Clavell v. El Vocero*, 15 Off.Trans. 902 (1984). In said decision our highest forum stated:

> As well as the states of the American Union, Puerto Rico has the faculty to establish its own standards of liability for defamation, provided that absolute liability is not imposed or *that the rules that be adopted do not reduce the minimum content of the First Amendment of the Constitution of the United States. Gertz v. Robert Welch Inc.*, 413 US 323, 347, 349 (1974).
>
> *Subject to these familiar limitations*, it is to the legal codes of Puerto Rico to where one must resort in order to assay the interests involved in defamation cases. In this area, American jurisprudence, state or federal, is only of an illustrative or persuasive nature. Our perception of the

> values involved and the way to conciliate them may be completely different. This situation is not particular to Puerto Rico." (Supplied emphasis; cite omitted).

What we resolve is that in this stage of the proceedings it is not in order to dismiss the complaint for reason that, as a matter of law, the relatives of a person which allegedly has been the object of false publications have a valid and protected cause of action. We contemplate the standard of establishing an adequate balance between the defendants' right to freedom of the press and the right of privacy of the plaintiffs.

In the light of the laws in effect in Puerto Rico, it is not in order to dismiss a cause of action for the mere fact that who claims the damage is not the person mentioned in the publication. Article 1802 of the Civil Code is precise as to the requirements that it establishes in order for an action for damages to prosper. Since it does not distinguish between a claim for mental damages and one for physical damages, what must be proved is that damage has occurred, that the originator of the damage was culpable and negligent in his conduct and that a causal relation existed between his conduct and the damages caused. The action brought by plaintiffs has a constitutional origin recognized by the Supreme Court of Puerto Rico and which this Court is bound to protect.

In accordance to the above-stated reasoning, the "Motion Requesting Judgment on the Allegations" presented by El Vocero is hereby: ***denied.***

Be it notified.
Issued in Ponce, P.R. March 19, 1992.

(Sgd.)
FELIPE ORTIZ ORTIZ
SUPERIOR JUDGE

NOTIFIED:
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Gentlemen:
You are hereby notified with a copy of the instant *RESOLUTION* filed in the instant case.
Ponce, P.R., March 24, 1992.
PAULITA COLON - GENERAL CLERK
BY: (Illegible signature)

(Seal of the Court)

Certified Translation

IN THE SUPREME COURT OF PUERTO RICO

Carmen Lucila Domínguez et al.		Appeal proceeding
v.		from the Superior
Caribbean International News Corp., etc.	No.AC-92-235	Court, Ponce Part

RESOLUTION

San Juan, Puerto Rico, November 13, 1992.

Considering that the Judicature Act provides that any final judgment by a lower court shall be appealable before the Supreme Court, the writ of appeal is hereby denied. After considering same as a petition for certiorari, same is hereby denied in this stage of the proceedings.

Agreed by the Court and hereby certified by the General Clerk. Mr. Associate Justice Rebollo López would issue. Mr. Chief Justice Andreu García disqualified himself.

(Initialed)
Francisco R. Agrait Lladó
General Clerk

Certified Translation

IN THE SUPREME COURT OF PUERTO RICO

Carmen Lucila Domínguez et al.		Appeal proceeding
v.		from the Superior
Caribbean International News Corp., etc.	No. AC-92-235	Court, Ponce Part

RESOLUTION

San Juan, Puerto Rico, December 18, 1992.

Having examined the first petition for rehearing, the Court denies said petition and the motion requesting consolidation with other appeals.

Agreed by the Court and hereby certified by the General Clerk.

(Initialed)
Francisco R. Agrait Lladó
General Clerk

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

No. 92-1394

In the Supreme Court of the United States

OCTOBER TERM, 1992

EL VOCERO DE PUERTO RICO
CARIBBEAN INTERNATIONAL NEWS CORP.
TOMAS DE JESUS MANGUAL,
PETITIONERS,

v.

CARMEN LUCILA DOMINGUEZ ORSINI
AND OTHERS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Resolutions of the Supreme Court of the Commonwealth of Puerto Rico presented for review in the present Petition for Writ of Certiorari are a final judgment for purposes of 28 U.S.C. sec. 1258 thus providing jurisdiction to the Supreme Court of the United States.

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In the
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1394

EL VOCERO DE PUERTO RICO
CARIBBEAN INTERNATIONAL NEWS CORP.
TOMAS DE JESUS MANGUAL,
PETITIONERS,

v.

CARMEN LUCILA DOMINGUEZ ORSINI
AND OTHERS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carmen Lucila Dominguez Orsini, Enrique Martinez Dominguez, Elsa Maria Maldonado Rodriguez, Raul Martinez Dominguez, Oraida Munoz Santiago, Carlos Luis Martinez Dominguez, Carmen Lucila Dominguez Vazquez, Carmen Martinez Bayo, Luz Maria Martinez Bayo, Ana Selenia Dominguez Orsini, Irene Dominguez Orsini, Lourdes del Carmen Martinez Negron, Jackeline Martinez Negron, Ileana Martinez Maldonado, Lymari Martinez Maldonado, Irelys Martinez Munoz, and Oraidalys Martinez Munoz, respectfully request that this Court deny the petition for writ or certiorari seeking review of two resolutions of the Supreme Court of the Commonwealth of Puerto Rico, dated respectively November 13, 1992 and December 18, 1992. Certified translations of both resolutions are reproduced in petitioners' appendix at pages 16 and 17.

I. Jurisdiction

Petitioners invoke jurisdiction pursuant to 28 U.S.C. sec. 1258 which provides for the review by this Court of final judgments or decrees of the Supreme Court of Puerto Rico. As argued in detail below, however, this Court lacks jurisdiction in this case since there is no final judgment or decree of the Supreme Court of Puerto Rico.

II. Statement Of The Case

On May 2, 1990, respondents in this case filed a tort suit against petitioners, El Vocero de Puerto Rico and Tomas de Jesus Mangual, as well as against WUNO, a local radio station. They alleged in essence that the defendants had published false and injurious information about a deceased relative and that as a result of said action they had suffered serious damages. On January 18, 1991, defendants El Vocero de Puerto Rico and Tomas de Jesus Mangual — petitioners in this case — filed a motion to dismiss pursuant to Rule 10.3 of the Puerto Rico Rules of Civil Procedure. P.R. Laws Ann., T. 32. Through resolution of March 19, 1992, the trial Court, the Superior Court of Puerto Rico, Ponce Part, denied the motion.[1]

Thereafter, on April 2, 1992, petitioners sought review before the Supreme Court of Puerto Rico of the resolution of the Superior Court denying their motion to dismiss. They did so by filing an appeal and a petition for writ of certiorari pursuant to Articles 14(a) and (f) of the Judicial Act of Puerto Rico, P.R. Laws Ann., T. 4, § 37 (a)(f) (1980).

On November 13, 1992, the Supreme Court of Puerto Rico denied the appeal since only certain final judgments of Superior Court are appealable to the Supreme Court of Puerto

[1] A translation of the Superior Court resolution is included in the Appendix to the Petition for Writ of Certiorari, pages 1-15.

Rico and, of course, petitioners were seeking review of an interlocutory matter. *See* App. to Pet. at 16. As to the petition for writ of certiorari, the Supreme Court denied it "at this stage of the proceedings". *Id.*[2] Petitioners requested reconsideration of the November 13, 1992 resolution and through resolution of December 18, 1992, the Supreme Court denied it[3]. In this case petitioners seek review by the Supreme Court of the United States of both the November 13, 1992 and the December 18, 1992 resolutions of the Supreme Court of Puerto Rico.

III. Reason Why The Petition Should Be Denied

THIS COURT LACKS JURISDICTION TO REVIEW THE RESOLUTIONS OF THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO PRESENTED FOR REVIEW IN THE PETITION FOR WRIT OF CERTIORARI.

The Jurisdiction in this case is sought invoking 28 U.S.C. sec. 1258, which provides for the review by this Court through writ of certiorari of "final judgments and decrees rendered by the Supreme Court of Puerto Rico." *See* 28 U.S.C. sec. 1258.[4]

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[2] At the time, interlocutory decisions of the Superior Court were reviewable by the Supreme Court of Puerto Rico "through certiorari to be issued at its discretion and not otherwise". *See*, P.R. Laws Ann., T. 4, § 37(f) (1980). The Judicial Act was later amended to add an intermediate Appeals Court. This new Court of Appeals now reviews through certiorari interlocutory decisions of the Superior Court. These decisions are in turn reviewable by the Supreme Court of Puerto Rico also by certiorari. See Act No. 21 of July 13, 1992.

[3] A certified translation of this resolution is included in the Appendix to the Petition for Writ of Certiorari, at page 17.

[4] 28 U.S.C. sec. 1257, which provides jurisdiction to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had" is identical to 28 U.S.C. sec. 1258 which provides the same authority in cases decided by the Supreme Court of the Commonwealth of Puerto Rico. Therefore, decision of this Court regarding 28 U.S.C. sec. 1257 control controversies which, as in this case, arise from 28 U.S.C. sec. 1258. *See, e.g., Posadas de Puerto Rico* v. *Tourism Co.*, 478 U.S. 328, 338 (1986).

It is not even arguable that the resolutions in question in this case are *not* final judgments of the Supreme Court of Puerto Rico. Therefore, it is likewise not even arguable that this Court lacks jurisdiction in this case.

The general rule is that the final judgment requirement "precludes reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State". *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945); *See also*, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47 (1987); *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981).

In essence, to meet the final judgment requirement, the decision to be reviewed by the Supreme Court of the United States must be "the final word of a final court". *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945); *See also*, R.L. Stern, E. Gressman & S.M. Shapiro, *Supreme Court Practice*, 120-122 (6th Ed. 1986).

In this case, further substantive proceedings in the courts of the Commonwealth of Puerto Rico must be had before a decision on the case can be said to be the final word of the Supreme Court of Puerto Rico.

As stated before, petitioners seek review by this Court of two resolutions issued by the Supreme Court of Puerto Rico. The first resolution, dated November 13, 1992, is a denial by the Puerto Rico Supreme Court to review through certiorari, at that time of the proceedings, a decision of the Superior Court of Puerto Rico denying a motion to dismiss the complaint filed by petitioners pursuant to Rule 10.3 of Puerto Rico Rules of Civil Procedure. This request was, of course, for a review of an interlocutory decision of the Superior Court, which at the time could be reviewed by the Supreme Court of Puerto Rico "through certiorari to be issued at its discretion". P.R. Laws Ann., T. 4, § 37(f)[5]. The second resolution

[5] See note 2, *supra*.

presented to this Court in this case is merely a denial to reconsider the first resolution.

These denials by the Supreme Court of Puerto Rico are not a decision on the merits of the case; rather, these denials mean nothing more than the fact that the Supreme Court of Puerto Rico has exercised its discretion of not reviewing an interlocutory matter at that stage of the proceedings. *Sociedad Legal de Gananciales* v. *Pauneto Rivera* 92 JTS 78, pp. 9593, 9596 (Supreme Court of Puerto Rico, June 17, 1992)[6]. Hence, several substantive proceedings were, and continue to be, pending or available at the courts of the Commonwealth of Puerto Rico. The Superior Court has yet to issue a final judgment in the case. Moreover, once this occurs, the losing party can either file a writ of review or an appeal before the Supreme Court of Puerto Rico seeking review of the Superior Court judgment. P.R. Laws Ann., T. 4, § 37(a)(b)[7]. On this new occasion the petitioner can once more present his federal question to the Supreme Court of Puerto Rico, as well as any other issue properly before the Court. *Sociedad Legal de Gananciales* v. *Pauneto Rivera*, 92 JTS 78 at 9596 (see Appendix at 17-18). Only after this occurs, that is, until the matter is again presented to the Supreme Court of Puerto Rico after a final judgment of the trial court and the Supreme Court decides the case, is the finality requirement of 28 U.S.C. sec. 1258 satisfied, for only that would be the "final word of the final Court". *See*, *Posadas de Puerto Rico* v. *Tourism Company*, 478 U.S. 328, 338 (1986).

Despite the discussion above, petitioners contend, without much argument, that "the judgment issued by the court below

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[6] A certified translation of this case is included in the Appendix.

[7] Although Puerto Rico's Judicial Code was recently amended to add a new intermediate court, *see* n. 2, *supra*, the provision giving this new Court jurisdiction to review final judgments of the Superior Court has yet to take effect. *See*, Art. 9, Act 21 of July 13, 1992. Hence, final judgments of the Superior Court continue to be reviewed by the Supreme Court of Puerto Rico through appeals or writ of review. P.R. Laws Ann. T. 4., § 37(a)(b) (1980).

is a 'final judgment' reviewable by this Court". Pet. at 2. For this proposition, petitioners cite *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

In *Cox*, this Court recognized that there are four categories of cases in which a judgment is considered final within 28 U.S.C. sec. 1257 even though further state court proceedings are anticipated. *Id* at 477-486. Without much discussion, petitioners state that this case falls within categories one, two and four of *Cox*. Pet. at 2, n.2. Reliance on *Cox* in this case, however is completely inappropriate. This Court made clear in *Cox* that the narrow exceptions recognized in the case apply only when the highest State Court has *finally decided* the federal issue present in the case. Thus, in referring to all of these exceptions, this Court states:

> [T]he Court has recurringly encountered situations *in which the highest Court of a State has finally determined the federal issue present in a particular case*, but in which there are further proceedings in the lower state courts to come.

Id. at 477 (emphasis added). Furthermore, in discussing each of the four categories, this Court reiterates the need for a final determination of the federal issue by the highest court of the State before the final judgment requirement of section 28 U.S.C. sec. 1257 is met:

> In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state court but where for one reason or another *the federal issue is conclusive* . . .

Id. at 479 (emphasis added)

> Second, there are cases . . . in which the federal issue, *finally decided by the highest court in the State*, will

> survive and require decision regardless of the outcome of further state court proceedings.

Id. at 480 (emphasis added)

> In the third category are those situations *where the federal claim has been finally decided*, with further proceedings on the merits in the State courts to come . . .

Id. at 481 (emphasis added)

> Lastly, there are those situations *where the federal issue has been finally decided in the State Courts* with further proceedings pending . . .

Id. at 482 (emphasis added).

Indeed, in later cases discussing or applying the four categories recognized in *Cox*, this Court has continued to emphasize the absolute need for a consideration on the merits and a final decision of the federal issue present in the case, by the highest court of the state. *See e.g. Asarco Inc.* v. *Kadish*, 490 U.S. 605, 611-612 (1989); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-57 (1989); *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 306-307 (1989); *Goodyear Atomic Corporation* v. *Miller*, 486 U.S. 174, 178-180 (1988); *First English Evan. Luth. Church* v. *Los Angeles County*, 482 U.S. 304, 309, n.3 (1987); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 46 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Flynt* v. *Ohio*, 451 U.S. 619, 620-623 (1981).

This absolute requirement of final determination of the federal issue is, of course, not present in this case. As stated earlier, the resolutions brought for review to this Court in this case are nothing more than a denial by the Supreme Court of Puerto Rico to review through certiorari, at that particular

moment, an interlocutory decision of the trial court not to dismiss the case.

In their petition, petitioners make a wrong statement regarding the meaning or the consequences of this denial by the Supreme Court of Puerto Rico. They state:

> As a result, the Supreme Court of Puerto Rico has implicitly recognized the respondents a cause of action for both libel and invasion of privacy. It has sanctioned the view that the First Amendment requirement that a publication be "of and concerning the plaintiff", as an element of a cause of action for libel or invasion of privacy, is not applicable to a plaintiff who is a "private" individual, even if the news items pertain to a matter of legitimate public interest.

Pet. at 6-7.

This statement is clearly incorrect. On June 17, 1992, less than a year before the petition in this case was filed, the Supreme Court of Puerto Rico reiterated a well established doctrine on the meaning or consequence of a denial of a writ of certiorari to review an interlocutory matter. In *Sociedad Legal de Gananciales* v. *Pauneto Rivera*, 92 JTS 78, p. 9593, the Supreme Court of Puerto Rico stated:

> It is a well-known fact that this Court's refusal to issue a writ of certiorari *does not mean that the Court has assumed a position with regard to the merits of the cause before its consideration*. In other words, a ruling by this Court denying a petition for certiorari *does not implicitly resolve* any matter against the petitioner for purposes of *res judicata*. The denial is simply representative of the discretionary power of this Court to refuse to review, at a given moment, a ruling issued by a court of first instance. See Rule 21 of the Supreme Court (4 L.P.R.A.

App. I-A). See also: *Heirs of Andrades* v. *Sosa*, 45 P.R.R. 710 (1933); and *Hughes Tool Co.* v. *T.W.A.*, 409 US 363 (1973).

Id. at 9596 (emphasis added) (see App. at 17-18)[8]. It is thus clear that, contrary to petitioners' contention, the denial of the petition for certiorari by the Supreme Court of Puerto Rico does not imply that Court's position regarding the merits of their federal defense nor does it "implicity" resolve anything regarding the merits of the case.[9] The Supreme Court of Puerto Rico simply exercised its discretion of not reviewing this interlocutory matter at that stage of the proceedings.[10] Hence, there is no doubt that the Supreme Court of Puerto Rico has not finally decided the federal question that petitioners present to this Court in this petition.

In sum, it is absolutely beyond dispute that this Court lacks jurisdiction in this case. 28 U.S.C. sec. 1258 limits review by this Court to "final judgment or decrees of the Supreme Court of Puerto Rico". The resolutions presented for review to this Court in this petition do not constitute a final judgment or decree of the Supreme Court of Puerto Rico for, as shown above, there are several substantive proceedings still pending

[8] The procedural history of *Sociedad Legal de Gananciales* v. *Pauneto Rivera* is similar to that in this case. There, as here, defendants had filed a motion to dismiss that had been denied by the trial court. Defendants in *Sociedad Legal de Gananciales* sought review through certiorari of this denial before the Supreme Court of Puerto Rico. The Supreme Court, as here, denied the certiorari. The case eventually returned to the Supreme Court of Puerto Rico and one of the controversies presented was the consequence or meaning of the original denial.

[9] This Court holds a similar view regarding the meaning of a denial of a petition for certiorari. *See e.g.*, *Hathorn* v. *Lovorn*, 457 U.S. 255, 262, n.11 (1982); *Hughes Tool Co.* v. *T.W.A., Inc.*, 409 U.S. 363, 366, n.1. (1973) (It is "well settled . . . that a denial of certiorari imparts no implication or inference concerning the court's view of the merits").

[10] Indeed, the fact that, in denying the certiorari, the Supreme Court of Puerto Rico added the phrase "in this stage of the proceedings", *see*, App. to Pet., at 16, although unnecessary to reach this conclusion, certainly supports it.

or available in the courts of the Commonwealth of Puerto Rico. Moreover, the narrow exceptions to the finality requirement recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) are inapplicable here because the federal issue presented in this petition has not been finally decided by the Supreme Court of Puerto Rico.

IV. Conclusion

For the reasons presented in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 17, 1993.

APPENDIX A

ESTADO LIBRE ASOCIADO DE PUERTO RICO
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SECRETARIA
NEGOCIADO DE TRADUCCIONES
APARTADO 2392
SAN JUAN, PUERTO RICO 00902-2392

CERTIFICATE OF TRANSLATION

This is to certify that the attached translation of the Opinion rendered by this Court on June 17, 1992, Case No. RE-88-181, Conjugal Partnership constituted by Nunez Borges and Huergo Menendez v. Pauneto Rivera and his wife, etc. --- ---------- made by the Bureau of Translations of the Supreme Court of Puerto Rico, is an accurate rendition into the English language of the original Spanish.

s/Olga A. Lasa Delgado
Olga A. Lasa Delgado, Director
Bureau of Translations
Supreme Court of Puerto Rico

CHIEF CLERK'S CERTIFICATE

I, Francisco R. Agrait-Llado, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation of the Opinion rendered by this Court on June 17, 1992, Case No. RE-88-181, Conjugal Partnership constituted by Nunez Borges and Huergo Menendez v. Pauneto Rivera and his wife, etc., ---------- made by the Bureau of Translations of this Court under the

authority of Act No. 87 of May 31, 1972, the original of which in Spanish is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon collection of the appropriate fees, I issue these presents under my hand and seal of this Court in San Juan, Puerto Rico, this 10th day of May, 1993.

s/Francisco R. Agrait-Llado

Francisco R. Agrait-Llado
Chief Clerk
Supreme Court of Puerto Rico

[seal]

[stamp]

(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

No. RE-88-181

Conjugal Partnership constituted by
Ivan Nunez Borges and Margarita Huergo Menendez,
and each one individually,

Plaintiffs and appellees

v.

Edwin Pauneto Rivera, his wife Laura Cosme de Pauneto,
and the Conjugal Partnership constituted by both,

Defendants, counterclaimants, and appellants.

REVIEW

JUSTICE REBOLLO LOPEZ delivered the opinion of the Court. San Juan, Puerto Rico, June 17, 1992.

The facts relevant to the correct adjudication of this petition, as they come forth, first and foremost, from the decision of this Court in *Pauneto* v. *Nunez*, 115 D.P.R. 591 (1984), are the following:

By contract dated July 30, 1974, Edwin Pauneto Rivera and his wife leased *some business premises* belonging to them and located in Levittown, Toa Baja, Puerto Rico, to Ivan Nunez Borges who was married to Margarita Huergo. While the lease was still in force, Nunez Borges made certain alterations that

damaged the building structure and, on the expiration of the contract, left the premises without paying some rents.

Pauneto Rivera and his wife sued Nunez Borges in the District Court of Puerto Rico, Toa Alta Part, seeking overdue and uncollected rents and compensation for the damage sustained as a result of the alterations to the structure. Neither Nunez Borges's wife nor the conjugal partnership constituted by them was joined as defendant.

The court rendered judgment against Nunez Borges and ordered him to pay Pauneto Rivera and his wife $15,000 in property damages, $400 in overdue rents, $4,308 in uncollected rents, plus the costs, and $500 in attorney's fees. The judgment became final and unappealable.

Two years later, Pauneto Rivera and his wife moved the District Court *under Civil Procedure Rule 51.7* to summons Margarita Huergo — Nunez Borges's wife — and the conjugal partnership constituted by them, to show cause why they should not be bound by the judgment in the same manner as if they had been originally sued. The District Court denied the petition and Pauneto Rivera sought review in the Superior Court, Bayamon Part. The Superior Court reversed the judgment and ruled that Rule 51.7 was applicable to the case at bar.

Nunez Borges sought review before this Court. We agreed to review and issued a show cause order. While Nunez Borges's petition for review was pending before the Court, *Pauneto Rivera entered in the Registry of the Property an [order for the] attachment of a real property belonging to Nunez Borges and his wife, that is, to the conjugal partnership constituted by them.*

When we reversed the ruling of the Superior Court in an Opinion issued *at the time*, we held that two requirements must be met when invoking Rule 51.7: "(1) previous joint liability arising from a contractual 'obligation'; and (2) that the persons against whom the Rule is invoked could have been sued and summoned when the action was filed." *Pauneto* v. *Nunez*, *supra*, at 596. With regard to the specific facts under

our consideration at the time, this Court concluded that Pauneto Rivera could not resort to the Rule 51.7 mechanism because "the joint liability bond as contemplated by said Rule [did] not exist a priori." *Id.* at 597.

At that point, Nunez Borges and his wife Margarita Huergo filed two actions in the Superior Court, Bayamon Part, against Pauneto Rivera and his wife. The first action sought to squash the attachment, which they believed was illegal, and the second action sought redress for the alleged damage sustained as a result of the unlawful attachment. Both actions were consolidated. *Codefendants Pauneto Rivera and his wife filed a counterclaim against the spouses Nunez-Huergo for the "subsidiary collection" of the judgment issued in the first action involving the parties.* Nunez Borges and his wife Margarita Huergo moved the court for the dismissal of the counterclaim. The trial court denied the motion. *Nunez Borges and his wife then filed a petition for certiorari with this Court. We denied the same.*

The spouses Nunez-Huergo then filed in the trial court a *second* motion to dismiss the counterclaim. This time, the court below granted the petition, and ruled that Pauneto's "counterclaim . . . only lies against Mr. Ivan Nunez Borges and not against the Conjugal Partnership constituted by him and his wife Margarita Huergo, . . . inasmuch as the judgment rendered by the District Court, Toa Alta Part, . . . was only directed against Mr. Ivan Nunez Borges. [Pauneto] had to exhaust the property of Mr. Nunez Borges in the previous action, which was not done, in order to properly include the Conjugal Partnership constituted by Nunez Borges and his wife, the defendants in the counterclaim in the above-captioned case." Exh. 1 of the Petition for Review.

Feeling aggrieved, Pauneto Rivera sought review of said judgment before this Court. He assigns three errors to the trial court:

Error No. 1: Refusing *sub-silentio* the "law of the case" argument raised with regard to the right of exhaustion in this action.

Error No. 2: Ruling that exhaustion of the property of coplaintiff Ivan Nunez Borges had to be made in the previous action, where he was ordered to compensate the Appellants.

Error No. 3: Failing to act on our alternative petition to join the appellees as third-party defendants. Petition for Review, at 3-4.

We issued the writ of review and decide as follows:

I

In the first place, we must determine whether *the trial court's denial* of the first motion to dismiss filed by Nunez Borges and his wife Margarita Huergo and *our denial of the petition for certiorari* filed by them, barred the trial court from subsequently granting the spouses Nunez-Huergo's second motion to dismiss. In other words, if the first denial became "law of the case" governing the issue raised here and precluding further review by the trial court.

In common law, "[i]n the absence of statute the phrase, *law of the case*, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). More than an unchanging, inflexible rule of law, the doctrine incorporates a desirable practice: the controversies of a cause heard, litigated and decided by a court, should ordinarily be deemed final. Thus, the parties to an action may, as far as possible, have reliable guidance

on how to conduct their affairs. *Dictograph Products Company* v. *Sonotone Corporation*, 230 F.2d 131, 135 (1956).

It is well known that "[i]n Puerto Rico, there does not exist a valid ground for the application of the law of the case . . . in the Anglo-American manner. . . . This matter is governed here, of course by the Civil Code." *Torres Cruz* v. *Municipio de San Juan*, 103 D.P.R. 217, 222 (1975). The practice approved by this Court, however, does not depart from the rules adopted by any advanced legal system. "[I]n order to watch for the orderly and speedy prosecution of the litigations, as well as for the stability and certainty of the law, a trial court should not resist itself to alter its pronouncements within the same case except when it is convinced that the same are erroneous. This is a matter of sound practice . . . and not an inviolable rule." *Id.* It is precisely because this principle does not constitute a steadfast rule or a bar to the power of the courts that in *Torres Cruz* we allowed a second judge to reverse the erred decision of a first judge of equal rank within the same case.

In view of the above, and despite the fact that we believe that courts of first instance must do an all-out effort to prevent contradictory and inconsistent rulings, in principle, there is no absolute legal bar precluding the court below in this case from reconsidering, so to speak, its original interlocutory decision or from granting the second motion to dismiss filed with said court by the spouses Nunez-Huergo.

On the other hand, the fact that this Court had denied the spouses Nunez-Huergo's petition for certiorari seeking review of the original denial of the court below does not affect the correctness of the subsequent action of said court granting the second motion to dismiss. It is a well-known fact that this Court's refusal to issue a writ of certiorari does not mean that the Court has assumed a position with regard to the merits of the cause before its consideration. In other words, a ruling by this Court denying a petition for certiorari does not implicitly resolve any matter against the petitioner for pur-

poses of *res judicata*. The denial is simply representative of the discretionary power of this Court to refuse to review, at a moment, a ruling issued by a court of first instance. See Rule 21 of the Supreme Court (4 L.P.R.A. App. I-A). See also: *Heirs of Andrades* v. *Sosa*, 45 P.R.R. 710 (1933), and *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973).

II

Consequently, we must decide whether the dismissal of the trial court — granting the second motion to dismiss — was proper at law.

The first ground adduced by the trial court to dismiss the counterclaim filed by Pauneto Rivera and his wife was that their "counterclaim ... only lies against Mr. Ivan Nunez Borges and not against the Conjugal Partnership constituted by him and his wife Margarita Huergo, ... inasmuch as the judgment rendered by the District Court, Toa Alta Part, ... was only directed against Mr. Ivan Nunez Borges." Exh. 1 of the Petition for Review. This reasoning, however, does not take into consideration the fact that Pauneto's counterclaim actually seeks to make the conjugal partnership constituted by Nunez and Huergo *secondarily* liable for the acts committed by one of its members — Ivan Nunez — under Civil Code sec. 1310, which provides that:

> **Section 3663. Debts contracted before marriage; fines**
>
> The payment of debts contracted by the husband or by the wife, before marriage, shall not be borne by the partnership.
>
> *Neither shall it bear the payment of fines or of pecuniary condemnations which may be imposed on either of them.*

However, the payment of debts contracted by the husband or by the wife, prior to the marriage, and that of fines and condemnations imposed on either of them, *may be claimed against the partnership property, after covering the expenses, mentioned in section 3661 of this title, if the debtor spouse should have no private capital, or were it insufficient;* but at the time of the liquidation of the partnership the payments, made for the specified causes, shall be charged to said spouse. 31 L.P.R.A. sec. 3663 (Emphasis supplied.)

In *Lugo Montalvo* v. *Gonzalez Manon*, 104 D.P.R. 372 (1975), we construed the *second paragraph* of sec. 1310 — that is, "the meaning of 'fines' and, particularly . . . what constitutes 'pecuniary condemnations' " (*id.* at 374) — and stated that:

> It seems evident, then, that the doctrine understands, quite rightfully in our opinion, that when the fine or penalty is produced by the commission of an offense, as a general rule — since there are exceptions, as we have seen — the liability is something personal of the spouse who committed it: *but in the cases of extracontractual civil liability, the liability shall be personal or of the community according to the facts which gave rise to it.* It is generally recognized that if the husband's action or enterprise produces financial benefits to the bulk of the community property, the liability shall also fall upon said property. As Scaevola states, "he who expects profits, should also expect losses," principle which in his opinion has been governing in matters of partnership from time immemorial. *Id.* at 378. (Emphasis supplied.)

The "obligation or liability" arising from the contract signed by the spouses Pauneto-Cosme and Nunez Borges — established in the original action between the parties — had all the "characteristics" appertaining to a "conjugal partner-

ship liability," inasmuch as it originated in a business transaction involving Nunez Borges which, in all probability, benefitted the conjugal partnership constituted by him and his wife, Margarita Huergo. *W.R.C. Props., Inc.* v. *Santana*, 116 D.P.R. ~~127,~~ 135 (1985). This fact, however, is *totally irrelevant* for two reasons: Margarita Huergo, Nunez Borges's wife, did not take part in the lease, and Pauneto Rivera and his wife *only sued* Nunez Borges. Consequently, *judgment was rendered only against the latter*.

Although this is correct, we *cannot* lose sight of the fact that Pauneto Rivera and his wife *allege* in their counterclaim that Nunez Borges does not presently have any property against which to enforce the judgment rendered by the District Court, Toa Baja Part, but that the conjugal partnership has enough. Thus, they pray the Superior Court, Bayamon Part, to "declare that the separate property of coplaintiff Nunez has been duly exhausted" and to proceed to enforce the above-mentioned judgment against the conjugal partnership constituted by the spouses Nunez-Huergo. Exh. 9 of the Petition for Review, at 23.

In view of these allegations and of the sec. 1310 subsidiary cause of action against the community property of the conjugal partnership constituted by the plaintiffs, the legality of the counterclaim filed by the spouses Pauneto-Rivera seems, *at first sight*, unquestionable. "[T]he conjugal partnership," according to Manresa, "is not liable for the payment, but there are legitimate interests at stake, creditors that must not lose their credits, torts, wrongs or injuries that must be redressed; and when the debtor spouse does not have separate property and there is an excess of community property, the law provides that compensation or redress be had against the conjugal partnership." J.M. Manresa y Navarro, IX-1 *Comentarios al Codigo Civil espanol* 626, Madrid, Reus (rev. 5th ed. 1950).

The trial court further reasoned that Pauneto Rivera "had to exhaust the property of Mr. Nunez Borges in the previous

action, which was not done, in order to properly include the Conjugal Partnership constituted by Nunez Borges and his wife, the defendants in the counterclaim in the above-captioned case." Exh. 1 of the Petition for Review. *From the outset*, we should point out that this pronouncement *correctly recognizes* that, pursuant to Civil Code sec. 1310, before recovering from the community property, it must be established that the liable spouse does not have assets or that said assets are insufficient, and that the conjugal partnership has the assets to satisfy the obligations. *Cruz Viera* v. *Registrador*, 118 D.P.R. 911 (1987). There is no doubt, *on the other hand*, in view of our decision in *Cruz Viera*, that the entry in the Registry of Property of an [order for the] attachment of a real property belonging to the spouses Nunez-Huergo was void and illegal. *Cruz Viera* v. *Registrador*, *supra*, at 916.

However, in our opinion, nothing in this case bars the *very* Superior Court, Bayamon Part, from *adjudicating* in a *single* action *not only* the claim for the damage, if any, sustained by the spouses Nunez-Huergo as a result of the attachment, *but also* the legality of the action; and from conducting the exhaustion and recovery proceedings against the community property under Civil Code sec. 1310. This course of action is advisable in order to secure the "just, speedy and inexpensive determination" of the issues raised here. See Civil Procedure Rule 1 of 1979 (32 L.P.R.A. App. III).

Consequently, *the judgment appealed is reversed and the case remanded to the trial court for further proceedings consistent with this opinion.*[1] *Judgment will be rendered accordingly.*

Justices Negron Garcia and Hernandez Denton concur in the result without a written opinion.

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[1] In view of our decision we need not pass upon the third assignment of error.

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No. 92-1394

In The

Supreme Court of the United States

October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.);
TOMAS DE JESUS MANGUAL,

Petitioners,

vs.

CARMEN LUCILA DOMINGUEZ ORSINI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

REPLY TO RESPONDENTS' OPPOSITION

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REPLY TO RESPONDENTS' OPPOSITION

Now come Petitioners and respectfully reply to the Opposition brief filed by Respondents.

The First Amendment issue has been dispositively adjudicated. Commonwealth courts have entertained and concretely resolved the federal issue, recognizing a cause of action in Puerto Rico that would be untenable in any of the fifty States. They hold that, notwithstanding the First Amendment case law of this Court requiring that a publication be "of and concerning" the plaintiff,[1] respondents have a "valid and protected cause of action." App. to Pet. for Cert. 14. Even though further proceedings remain, petitioner's First Amendment rights have been "finally decided in the state courts."[2] Since the underlying facts are not in controversy, the federal issue will survive discovery proceedings and trial intact. No further review of the decision is available until after trial on the merits.

Respondents cautiously refrain from comment as to the "merits" of the adjudication. They do not contend that the issue has been decided correctly.[3] They rely on an

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[1] *New York Times v. Sullivan*, 376 U.S. 254, 288-292 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 (1966). See discussion at pp. 8-9 of our Petition for Certiorari.

[2] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482 (1975). See *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Mills v. Alabama*, 384 U.S. 214 (1966).

[3] An elaborate effort to distinguish the Puerto Rico and California preliminary hearings was recently called "insubstantial" by this Court. See, *El Vocero v. Puerto Rico*, No. 92-949 (Per Curiam Opinion issued May 17, 1993). There, as in this case, First Amendment rights were too readily subordinated to the Commonwealth's interest in protecting privacy interests.

unacceptably mechanical approach to the finality requirement of 28 U.S.C. Secs. 1257-1258. In contrast, this Court has traditionally used a more flexible, pragmatic approach.[4] This Court's expressions in *Forgay v. Conrad*, 6 Howard 201, 203 (1848), some 145 years young, are an appropriate joinder to the conclusory argument that the ruling is not "final":

> Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

Prompt adjudication of the proper scope of First Amendment rights has been consistently recognized by this Court as "a 'federal policy' that merits application of an exception to the general finality rule."[5] Until an

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[4] See *Cox, supra*, 420 U.S. at 479, n.8. Many cases stress the importance of delay in jeopardizing the federal rights involved. See, e.g., Wright, Miller, Cooper & Gresham, *Federal Practice and Procedure*, secs. 4008-4010; Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L.Rev. 1004, 1016 (1978) ("[F]orcing the appellant to await the official conclusion and to bring his appeal once again through the state court system entails the expenditure of both judicial and litigants' resources not in consideration of substantive issues, but in the sterile exercising of satisfying the formal indicia of finality.").

[5] *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989), citing *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977). Potential erosion of other important federal policies *pendente lite* has been seen as a legitimate basis to grant immediate vindication of the federal right. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

authoritative decision is issued by this Court on this matter, the news media in Puerto Rico will continue to be subjected to the chilling effects of new litigation by unknown potential plaintiffs. We were denied consolidation with three other El Vocero Appeals which have been submitted for resolution for an inordinately long time before the Commonwealth Supreme Court. App. to Pet. for Cert. 17. The First Amendment "of and concerning" requirement is dispositive of those appeals as well as the present case.[6]

None of them can survive the constitutional hurdle erected by *New York Times* and *Rosenblatt*. With denial of review the Puerto Rico Supreme Court has decided the issue silently, but nonetheless eloquently.

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[6] See n.7 of our Petition. In the *Rodríguez* and *Campoamor* cases, under consideration for 3 years, El Vocero seeks reversal of denials of summary judgment. In *González*, summary judgment was granted to El Vocero; the appeal was promptly granted *and* consolidated *motu proprio* with the other 2 pending cases.

CONCLUSION

For the foregoing reasons, we submit that this Court has jurisdiction over the present Petition, and request that the writ be granted in light of the merits of the case.

Respectfully, submitted, this 1st day of June, 1993.

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